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## SUMMARY

The comments overwhelmingly support grant of the Petition, which seeks a declaratory ruling that Western Wireless' BUS offering in Kansas is a fixed service and that federal law does not pre-empt Kansas from applying to it regulations that generally apply to ETC services and to competitive local exchange services. Even the Kansas Corporation Commission joins in asking the Commission to rule on the Petition, although it does not take a position on whether it should be granted or denied.

Four parties, Western Wireless, Sprint PCS, Dobson Cellular, and the Rural Telecommunications Group oppose the Petition. The Opponents fail, however, to provide any sound basis for denying the Petition. They attempt and fail to raise procedural bars. They also attempt and fail to demonstrate that BUS is a mobile service, that BUS is ancillary or incidental to a mobile service, and that BUS should be regulated as a mobile service regardless of whether it is fixed or mobile. Despite their protestations and attempts to twist the Communications Act and Commission precedents in ways that would make BUS fit within the definition of mobile services, the Opponents cannot avoid the foundational requirement in the Act that a mobile service is one that is provided via a radio station that both is "capable of being moved" and that "*ordinarily does move.*"

Western Wireless' own comments, its marketing materials, and its public statements all demonstrate that BUS is intended to be and is a fixed service. The characteristics of the radio station equipment, the terms of the rate plan, and the terms of the customer service agreement further demonstrate that BUS is intended to be and is a fixed service. It is only in the context of regulatory proceedings in which Western Wireless attempts to avoid regulations that are generally

applicable to the kind of service it offers does Western Wireless suddenly suggest that BUS is anything but a fixed service. As the comments attest, Western Wireless' doublespeak has effectively obfuscated the issues and blurred the distinction between service providers that use CMRS spectrum to provide a service and the fixed or mobile nature of the particular service itself.

The Commission should therefore take this opportunity to end the controversy and to eliminate the confusion that Western Wireless has wrought in Kansas and elsewhere. The Commission should grant the Petition and clarify that BUS is a fixed wireless service and that federal law does not pre-empt Kansas from applying to BUS regulations that generally apply to all ETC services and to competitive local exchange services. Kansas can then freely decide whether and how to apply its regulations in furtherance of the public interest, promotion of competition, and protection of Kansas consumers.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of the State Independent	)	
Alliance and the Independent	)	
Telecommunications Group for a	)	WT-00-239
Declaratory Ruling That the	)	
Basic Universal Service Offering	)	
Provided by Western Wireless in	)	
Kansas is Subject to Regulation as	)	
Local Exchange Service	)	

**REPLY COMMENTS OF THE STATE INDEPENDENT ALLIANCE AND THE  
INDEPENDENT TELECOMMUNICATIONS GROUP**

The 37 independent telephone companies that are members of the State Independent Alliance (“SIA”) and the Independent Telecommunications Group (“ITG”) (collectively, the “Petitioners”)<sup>1</sup> respectfully submit these reply comments in the above-captioned proceeding. Petitioners respectfully reiterate their request, pursuant to the *Second Report and Order and Order on Reconsideration* in WT Docket No. 96-6<sup>2</sup> and Section 1.2 of the Commission’s rules,<sup>3</sup> that the Commission issue a declaratory ruling that the Basic Universal Service (BUS) offering of WWC Holding Company, Inc. d/b/a CellularONE ( “Western Wireless”) in the State of Kansas is a fixed service rather than a Commercial Mobile Radio Service (“CMRS”) and is subject to regulation as a local exchange carrier service, and that such regulation is not preempted by

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<sup>1</sup> The members of SIA and ITG were identified in Attachment A to the Petition.

<sup>2</sup> *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, Second Report and Order and Order on Reconsideration, WT Docket 96-6, FCC 00-246 (rel. July 20, 2000) (“*Second Report and Order*”).

<sup>3</sup> 47 C.F.R. § 1.2.

Section 332(c)(3) or other sections of the Communications Act.

## **I. INTRODUCTION AND BACKGROUND**

On November 3, 2000, Petitioners filed a Petition for Declaratory Ruling in which they asked the Commission to settle confusion that existed with respect to the CMRS status of Western Wireless' BUS offering in Kansas in light of Western Wireless' request to be designated as an Eligible Telecommunications Carrier ("ETC") for its cellular service area covering a large portion of the eastern half of Kansas. Western Wireless' application claimed eligibility for ETC status on the basis of its intent to offer a service meeting all the criteria in Section 54.101(a) of the Commission's rules regarding universal service ("USF"), as well as applicable Kansas rules for Kansas USF ("KUSF"). BUS would be provided by means of wireless transmission to and from special radio station equipment. The two-way transmissions would be carried over Western Wireless' existing facilities providing cellular mobile service. Petitioners requested that the Commission declare that Western Wireless' BUS offering is not CMRS and that federal law does not prohibit or preempt Kansas from applying to it regulations and USF requirements that are generally applicable to local exchange carrier services.

Comments and oppositions to the Petition were filed on or about December 21, 2000 pursuant to a schedule established by the Commission. Four parties filed oppositions to the Petition.<sup>4</sup> The Kansas Corporation Commission ("KCC") asked the Commission to address the issues raised in the Petition and all other commenters supported grant of the Petition.<sup>5</sup> The

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<sup>4</sup> The four parties who filed oppositions are Western Wireless, Sprint PCS, Dobson Cellular, and the Rural Telecommunications Group.

<sup>5</sup> Commenters supporting the Petition are: Rural Iowa Independent Telephone Association; National Telephone Cooperative Association; Minnesota Independent Coalition;

supporting comments vividly demonstrate the need for the Commission to grant this petition and to clarify that Western Wireless' BUS offering in Kansas is not CMRS and is subject to regulations generally applicable to all ETCs in Kansas.

## **II. DECLARATORY RULING IS NECESSARY TO TERMINATE CONTROVERSY AND TO ELIMINATE CONFUSION AND IS PROCEDURALLY PROPER**

The commenters make clear that there has been significant controversy and confusion over the CMRS status of BUS in Kansas and similar offerings in other states. This is exactly the kind of controversy and confusion that declaratory ruling is intended to eliminate.<sup>6</sup> Importantly, even the Kansas Corporation Commission ("KCC") has asked that the Commission rule on the Petition so that it may benefit from the Commission's guidance in its consideration of Western Wireless' petition to be designated as an ETC throughout the portions of its service area in Kansas that include study areas of Rural Telephone Companies.<sup>7</sup> In light of the KCC's request, the Rural Telecommunications Group's ("RTG") opposition on the grounds that the KCC has not asked for the Commission to address the issues raised in the Petition is moot.<sup>8</sup>

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Beacon Telecommunications Advisors, LLC; Nebraska Rural Independent Companies; Warinner, Gesinger & Associates, LLC; Fred Williamson & Associates, Inc.; Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO); South Dakota Independent Telephone Coalition, Inc.; John Staurulakis, Inc.; and Rural Utilities Service.

<sup>6</sup> See 47 C.F.R. § 1.2

<sup>7</sup> KCC Comments at 2.

<sup>8</sup> RTG Comments at 2-4.

Sprint PCS' contention that the Petition is a collateral attack on established Commission precedents is wholly without merit.<sup>9</sup> Petitioners do not here seek to overturn any established precedent.<sup>10</sup> Instead, they ask the Commission to determine whether BUS should be regulated as CMRS in direct response to the Commission's invitation for interested parties to seek declaratory rulings on whether services "that include a fixed wireless component" should be regulated as CMRS.<sup>11</sup> The fact that the Commission invited such petitions strongly suggests that the Commission does not view such petitions as being collateral attacks on its own precedents.

Sprint PCS bases its collateral attack claim on the assumption that BUS is an ancillary service, which the Commission has already determined should be regulated as CMRS.<sup>12</sup> Petitioners do not dispute that the Commission has ruled that ancillary services are to be regulated as CMRS. As will be discussed in more detail, however, BUS is not ancillary.<sup>13</sup> Further, the Commission expressly noted that when it permitted fixed services to be offered on a co-primary

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<sup>9</sup> See Sprint PCS Opposition at 6-8. Sprint PCS offers no explanation of why BUS is ancillary.

<sup>10</sup> For the reasons discussed below, the question of whether the Commission's prior rulings are consistent with the statutory definition of mobile service is not presented. Nevertheless, the Opponents cannot validly argue that the Commission is free to disregard a portion of the statute. *Iowa Utilities Board v. FCC*, 219 F.3d 744, 749, 759-760 (8<sup>th</sup> Cir. 2000); *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1994). Petitioners do not waive the right to challenge the legality of any rules or policies that are contrary to the plain meaning of the Act in an appropriate forum.

<sup>11</sup> Petition at 2 (citing *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, Second Report and Order and Order on Reconsideration, WT Docket 96-6, FCC 00-246 (rel. July 20, 2000) ("*Second Report and Order*") at paras 7-8).

<sup>12</sup> Sprint PCS Opposition at 7.

<sup>13</sup> See Part III A, *infra*.



basis with mobile services, it was opening the door to services that go far beyond ancillary services and that the appropriate regulatory treatment of wireless services having a fixed component was open to question.<sup>14</sup>

### **III. WESTERN WIRELESS AND PARTIES OPPOSING THE PETITION HAVE FAILED TO DEMONSTRATE THAT BUS IS MOBILE**

Western Wireless, Sprint PCS, and Dobson Cellular all attempt to demonstrate that existing Commission precedents and rules conclusively resolve the question of whether BUS should be regulated as a mobile service and whether it is subject to generic state regulations that apply to all ETCs.<sup>15</sup> Their position flies directly into the face of the Commission and its orders in which it made clear that the regulatory treatment that should be applied to fixed wireless services is far from clear and specifically invited petitions for declaratory ruling seeking a determination of the CMRS status of particular service offerings.<sup>16</sup>

Further, Sprint PCS and Dobson Cellular both raise arguments based on statutory provisions and FCC rules and orders that relate to PCS.<sup>17</sup> The Act defines mobile services somewhat differently in the context of PCS than in the context of non-PCS services that use the CMRS spectrum. Because BUS is provided over analog cellular spectrum, arguments based on

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<sup>14</sup> *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8965, 8985 (August 1, 1996) ("*First Report and Order*").

<sup>15</sup> Western Wireless Opposition at 8-18; Sprint PCS Opposition at 8-13; Dobson Cellular Opposition at 2-14.

<sup>16</sup> *See, e.g., Second Report and Order* at paras 7-8 and *First Report and Order*, 11 FCC Rcd at 8985.

<sup>17</sup> *See, e.g.,* Sprint PCS Opposition at 9-11; Dobson Cellular Opposition at 3 and 5.

PCS definitions or rulings are irrelevant and immaterial.<sup>18</sup> In any event, the Commission has determined that the definition of mobile service in the act does not necessarily include all PCS services.<sup>19</sup>

**A. BUS is Not an Ancillary or Incidental Service**

BUS is not ancillary or incidental to Western Wireless' mobile services by any stretch of the imagination. Ancillary means accessory or auxiliary.<sup>20</sup> Incidental means something that occurs in subordinate conjunction with something else.<sup>21</sup> The clear theme is that the incidental or ancillary service is subordinate to the primary service and does not stand alone on its own.

BUS, while a new service and not yet enjoying market penetration comparable to wireline offerings in Kansas, is hardly subordinate to Western Wireless' mobile offerings and openly stands alone. Indeed, Western Wireless has proclaimed the advent of BUS from the rooftops. It also is looking to BUS and its associated Universal Service support for a major source of new revenue separate and apart from and in addition to its mobile service offerings.<sup>22</sup>

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<sup>18</sup> Mobile service includes "any service for which a license is required in a personal communications service established pursuant to the proceeding entitled 'Amendment to the Commission's Rules to Establish New Personal Communications Services (GEN Docket No. 90-314; ET Docket No. 92-100) or any successor proceeding.'" 47 U.S.C. § 153(28)(C).

<sup>19</sup> *First Report and Order*, 11 FCC Rcd at 8986.

<sup>20</sup> Webster's Encyclopedic Unabridged Dictionary of the English Language at 55 (1989).

<sup>21</sup> *Id.* at 720.

<sup>22</sup> *See, e.g.*, Western Wireless Corporation, Form 10-K (March 20, 2000) at 4 and following text.

In a May 22, 2000 press release, Western Wireless hailed as “landmark” and “unprecedented” the KCC order granting it ETC status and announced the introduction of BUS in “more than 20 rural communities in Minnesota and Kansas and plans to expand its service offering to more than 100 rural communities by the end of the year.”<sup>23</sup> According to Mikal Thomsen, Chief Operating Officer of Western Wireless Corporation, while speaking to regulators and the industry, “basic cellular mobility service is only part of [Western Wireless’] story.” Mr. Thomsen goes on to glowingly describe Western Wireless’ provision of “wireless local loop service” and its rapid roll out of the service upon receipt of ETC designations. An attachment to Mr. Thomsen’s remarks entitled “The Western Wireless Story” lists wireless local loop service and universal service, both of which refer to BUS, as two of the four major services provided by Western Wireless. Mobile service is one of the other major services.<sup>24</sup> This is hardly the kind of acclaim normally associated with an ancillary or incidental service. By Western Wireless’ own public statements, it does not view BUS as ancillary or incidental to its mobile service offerings.

Western Wireless’ attempt to now show in its Opposition that BUS is incidental pursuant to 47 C.F.R. § 22.323 is unavailing. Western Wireless claims that the three criteria listed in that rule define “incidental” services.<sup>25</sup> The rule, however, does not define “incidental” or any of the other terms that the Commission has used to describe the limited-scope, subordinate fixed

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<sup>23</sup> [www.cellularonewest.com/PressRelease/Press Release3.asp](http://www.cellularonewest.com/PressRelease/PressRelease3.asp).

<sup>24</sup> Letter, with attachment, from James H. Blundell, Director, External Affairs for Western Wireless, to Magalie Roman Salas, Secretary, FCC (April 28, 2000).

<sup>25</sup> Western Wireless Opposition at 16.

services that CMRS licensees could provide using their CMRS spectrum.<sup>26</sup> Instead, the rule merely states under what conditions a service that is otherwise determined to be incidental may be offered by a CMRS licensee using its CMRS spectrum.

There is a logical gap in the Opponents arguments that BUS is incidental and therefore should be regulated as CMRS. Had the Commission's rules permitting incidental or ancillary fixed uses of CMRS spectrum been sufficient to permit large scale fixed offerings such as BUS, there would have been no need for the Commission to change its rules to permit fixed uses of CMRS spectrum on a co-primary basis with mobile uses.<sup>27</sup> Even Western Wireless stated in its comments in response to the further notice of proposed rulemaking portion of the *First Report and Order* that it "is well-situated to provide fixed-wireless service, including wireless local loop service . . . ."<sup>28</sup> Obviously, Western Wireless intended (as history has borne out) to take advantage of the new ability to offer fixed services on a co-primary basis.

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<sup>26</sup> *First Report and Order*, 11 FCC Rcd at 8970 (stating that the Commission's rules do not define "ancillary," "auxiliary," or "incidental").

<sup>27</sup> In light of this rule change, the Commission has cast doubt on whether its prior treatment of truly ancillary or incidental fixed services has any precedential value at all. *First Report and Order*, 11 FCC Rcd at 8987. The Commission appears to suggest that it has no precedential value. In the *Second Report and Order*, the Commission left its rule about incidental service in place, albeit with the deletion of a notification requirement, but continued to question whether it was necessary or appropriate. *Second Report and Order* at paras. 11-14. At the same time, however, the Commission made clear that the question of whether any particular wireless service that has even just a fixed component should be regulated as CMRS is wide open for determination pursuant to a petition for declaratory ruling, such as that filed by Petitioners. *Id.* at paras. 7-8.

<sup>28</sup> *Comments of Western Wireless Corporation*, WT Docket No. 96-6, Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services (November 25, 1996) at n. 1.

## **B. BUS is Not Just Another Mobile Rate Plan**

BUS cannot be treated as just another mobile rate plan for the simple reason that it isn't just another mobile rate plan. BUS is intended and designed to be a fixed wireless local loop service to compete with wireline local exchange service. The rate plan characteristics and radio station equipment attributes bear this out. BUS is not listed among the several mobile calling plans on Western Wireless' website<sup>29</sup> nor is the Fixed Wireless Terminal listed among the available phones for Western Wireless mobile service offerings.<sup>30</sup> BUS is a service, within the meaning of the *Second Report and Order* and Title II, that must be evaluated on its own.

Arguments that BUS must be considered CMRS because it is only one of Western Wireless' several rate plans and service offerings amounts to the argument that any service offering of a CMRS licensee is mobile.<sup>31</sup> The Commission has already determined that a fixed service offering using CMRS spectrum is not mobile simply because it is offered by a CMRS licensee.<sup>32</sup> As noted in the Petition, the Commission has refuted this argument even in the context of PCS, Section 3(27)(C) notwithstanding.<sup>33</sup> If any service using CMRS spectrum were mobile, there would be no need for the Commission to determine whether fixed wireless services should

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<sup>29</sup> [www.cellularonewest.com/plan.asp](http://www.cellularonewest.com/plan.asp) (January 3, 2001).

<sup>30</sup> [www.cellularonewest.com/phones.asp](http://www.cellularonewest.com/phones.asp) (January 3, 2001).

<sup>31</sup> Western Wireless Opposition at 2-5. *See also* Sprint PCS Opposition at 9-11.

<sup>32</sup> *First Report and Order*, 11 FCC Rcd at 8985 -8987 and *Second Report and Order* at paras 7-8.

<sup>33</sup> Petition at 6 (citing *First Report and Order*, 11 FCC Rcd at 8986).

be regulated as CMRS.<sup>34</sup>

**C. BUS is Fixed by Design and Intent, Not Because of Technological Limitations**

Dobson Cellular's argument that the nature of the Fixed Wireless Terminal does not preclude the service from being treated as mobile misses the point.<sup>35</sup> It is the size, weight, and awkwardness of carrying the Fixed Wireless Terminal, its external lead-acid batteries, connecting wire, and standard telephone as compared to the ease of portability of present mobile telephones that demonstrates that neither the intended nor likely use of BUS will "ordinarily" involve movement. One need only look at the myriad choices of cellular telephones available to see that the technology exists to make mobile radio stations very small and compact. For example, the Motorola V3620 offered by Western Wireless weighs only 2.7 ounces and occupies only 4 cubic inches of space.<sup>36</sup> In contrast, the Telular Phonecell SX3i used for BUS weighs 4.6 pounds without batteries<sup>37</sup> and occupies 420 cubic inches of space.<sup>38</sup> The difference is that the Motorola unit, which is 100 times smaller than the Fixed Wireless Terminal,<sup>39</sup> was designed to be mobile

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<sup>34</sup> Contrary to Sprint PCS' assertion (Sprint PCS Opposition at 11), Congress did not determine that CMRS licensees should be regulated only if subscribers have no alternative. The pre-emption of state regulation applies to "commercial mobile service" not to CMRS licensees. See 47 U.S.C. § 332(c)(3).

<sup>35</sup> Dobson Cellular Opposition at 4-7.

<sup>36</sup> [www.cellularonewest.com/phonedet.asp?phoneID=69](http://www.cellularonewest.com/phonedet.asp?phoneID=69) (January 3, 2001).

<sup>37</sup> The batteries are of the heavy lead-acid variety and are external to the Fixed Wireless Terminal.

<sup>38</sup> The Fixed Wireless Terminal used by Western Wireless to provide BUS measures 2.76 in. x 12.9 in. x 11.8 in.

<sup>39</sup> The Motorola V3620 is many times smaller still than the Fixed Wireless Terminal radio station when one considers that the Fixed Wireless Terminal alone is not a functional radio

and ordinarily to move, while the Telular Fixed Wireless Terminal was designed to be fixed and not ordinarily to move. Nor is the Fixed Wireless Terminal similar to a bag phone as Dobson Cellular contends.<sup>40</sup> Bag phones were nothing more than a cellular radio and handset designed to be permanently mounted in an automobile placed in a carrying bag. This offered the convenience of being able to transfer the radio and handset between vehicles.

More important than the equipment manufacturer's intent is Western Wireless' intent. Simply put, Western Wireless does not want BUS to be used as a mobile service. The reason is clear – a mobile service priced at \$14.99 per month with unlimited local calling would cannibalize Western Wireless' other mobile service offerings, the cheapest of which provides 75 minutes of local calling monthly for \$24.99.<sup>41</sup> Just so, Western Wireless has chosen to provide BUS using a radio station that is not designed to be mobile.

**D. Western Wireless' Suggested Factors for Determining Mobile Nature of Service are Not Dispositive, But Favor Finding BUS to be Fixed**

Western Wireless relies upon several factors identified in the NPRM portion of the *First Report and Order* in a futile attempt to demonstrate that BUS is mobile. The Commission specifically declined to adopt these factors in determining whether a service is fixed or mobile and

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station until it is accompanied by its external lead-acid batteries, connecting wires, and standard telephone.

<sup>40</sup> Dobson Cellular Opposition at 7 (citing *Blundell Cross* at 63).

<sup>41</sup> [www.cellularonewest.com/plan.asp](http://www.cellularonewest.com/plan.asp) (January 3, 2001). An example helps elucidate the point: The effective per-minute rate under the \$24.99 mobile service plan, which includes 75 minutes of usage, is 33 cents per minute. Additional minutes are 35 cents each. The same 75 minutes on the BUS fixed service plan would result in an effective per-minute rate of 20 cents. Additional minutes of use reduce the effective per minute cost for all minutes such that 150 minutes of use would result in an effective per-minute rate of 10 cents.

declined to identify any specific factors that it would consider in determining whether a particular fixed wireless service should be regulated as a mobile service.<sup>42</sup> Thus, although these factors are not dispositive, they along with other information contained in the oppositions and comments favor a finding that BUS is fixed.

As has been discussed by Petitioners at length, the Fixed Wireless Terminal has very limited mobility and BUS is not offered in conjunction with any mobile service. BUS customers do not get any sort of mobile handset or a discount on any mobile rate plans, nor does the BUS service offering include any mobile minutes of use outside of the BUS local calling area but within the larger local calling area associated with Western Wireless' mobile service offerings in Kansas. Thus, there is no integration of the BUS offering and mobile service offerings.

Further, customers perceive BUS to be a fixed service, which is how it is marketed. Western Wireless' intention is that consumers will view BUS as comparable to basic wireline telephone service, which is a fixed service.<sup>43</sup> Western Wireless also admits that it markets BUS differently than its mobile services.<sup>44</sup> Just so, its marketing materials make no mention of mobile use. Exhibit A hereto is an advertising insert taken from a Minneapolis, Kansas newspaper. Exhibit B is an advertising flyer distributed at a supermarket in the same town. Both advertisements depict BUS only as fixed service available at residential locations in place of residential wireline service provided by the incumbent wireline local exchange carrier.

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<sup>42</sup> *Second Report and Order* at paras. 7-8.

<sup>43</sup> *See, e.g.*, Western Wireless Opposition at 5 and 20.

<sup>44</sup> Western Wireless Opposition at 14.



Contrary to Western Wireless' protestations, names, descriptions, and promotional and marketing characterizations of a service necessarily reflect what the service is and how it is intended to be used.<sup>45</sup> Consumer expectations about products are shaped by marketing. When consumers purchase a product, they expect it to have the features, functionalities, characteristics, and uses that were portrayed in the marketing materials. It would be disingenuous if not misleading to describe BUS as the service to buy to use "on the go" or to "keep in touch wherever you go." Needless to say, if customers heard such marketing descriptions, they would not be pleased to find out that they must carry around several pounds of equipment, two separate batteries, connecting wires, and a conventional telephone to use BUS "on the go." Just so, Western Wireless offers mobile services that use very small and light handsets for use "on the go." Western Wireless' oft-repeated descriptions of BUS as a fixed service in many contexts clearly indicate that BUS is exactly that – a fixed service. It is only in the context of regulatory proceedings and efforts to avoid regulations generally applicable to such services that Western Wireless suddenly describes BUS as mobile.

Because BUS is a fixed service, Western Wireless cannot help but refer to it as such and to treat it as such. For example, the Kansas customer services agreement treats BUS as fixed. Section 1 speaks of using "wireless local loop equipment at Customer's premises." Section 2 discusses allowing a technician access to the customer's home to "install, repair, and maintain" the Fixed Wireless Terminal. Also, the advertisement attached as Exhibit A describes an installation fee of \$30.00. Technicians do not visit customers' homes to "install" truly mobile phones. Section 2 also requires the customer to indemnify Western Wireless for theft of the Fixed Wireless

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<sup>45</sup> See Western Wireless Opposition at 19-20.

Terminal from the customer's premises. Either Western Wireless intends that the Fixed Wireless Terminal will remain fixed, after installation, at the customer's residence or it left a big loophole for thefts that occur while the Fixed Wireless Terminal is used in a mobile fashion, exactly when thefts would seem more likely to occur.

Additionally, the BUS Welcome Package states that the Fixed Wireless Terminal must be "placed or mounted on a flat, level surface" in order to avoid overheating it.<sup>46</sup> This is fine for a piece of equipment that is mounted in a customer's home and not moved, but it is not particularly conducive to tossing it onto the seat of a car and driving around with it all day. Users are also cautioned to remain at least 16 inches away from the antenna. This could be difficult in a small car or if the user attempts to use the Fixed Wireless Terminal while walking or while riding public transportation.

Of course, the Welcome Package does not in any way mention mobile use of the Fixed Wireless Terminal or BUS. The only mention of any mobile use of any service is in a graphic device containing a public service announcement on the back cover that reminds mobile phone users use their phones safely while driving. This is especially unconvincing because the graphic includes a depiction of a truly mobile handset along with the text. Further, this graphic appears to be one regularly used by Western Wireless.<sup>47</sup>

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<sup>46</sup> Western Wireless Opposition, Exhibit C at page 8.

<sup>47</sup> This is the same graphic that Western Wireless includes on bill inserts for its mobile services. A copy of the bill insert, which includes the graphic along with a picture of a driver using a truly mobile handset while driving, is attached as Exhibit C.

**E. The Commission's BETRS Decisions Support Finding BUS to be Fixed**

Despite differences between BETRS and BUS, these two services share a key characteristic – both substitute radio waves for a wireline local loop in the provision of basic exchange telephone service at a fixed customer location. Thus, the Commission decisions finding BETRS to be a fixed service, despite the fact that it uses mobile service spectrum, are illustrative of the appropriate regulatory treatment of functionally similar services.<sup>48</sup>

**F. Fixed Wireless Terminal is Network Equipment, Not CPE**

Western Wireless, Sprint PCS, and Dobson Cellular all refer to the Fixed Wireless Terminal as customer premises equipment (“CPE”), but do not explain why it should be considered CPE. As Petitioners pointed out, the Fixed Wireless Terminal takes the place of the Network Interface Device (“NID”) in wireline telephony.<sup>49</sup> The BUS customers’ CPE and inside wire connect to the Fixed Wireless Terminal in the same fashion as they connect to a NID in wireline telephony. This stands in stark contrast to a truly mobile handset that integrates a keypad and ear and mouth pieces into the same unit that interfaces with the network. Additionally, customers own their mobile handsets, but do not own the Fixed Wireless Terminal.<sup>50</sup> The Customer Service Agreement also contemplates that the Fixed Wireless Terminal is network equipment rather than CPE. For example, Section 2 requires the customer to provide space for Western Wireless to install its “equipment,” to permit access to the premises for purposes of

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<sup>48</sup> See, e.g., *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1425 (1994) (“Regulatory Parity Order”).

<sup>49</sup> Petition at 8.

<sup>50</sup> *Blundell Cross* at 69.

installation, repair, and maintenance of its “equipment,” to indemnify Western Wireless for theft of its “equipment or facilities” installed at the customer’s premises, and to pay for replacement or repair of damage to its “equipment or facilities” caused by negligent or improper use by the customer or others. Of course, the only Western Wireless “equipment or facilities” at the customer location is the Fixed Wireless Terminal and maybe an exterior antenna. Moreover, Section 1.6.1.1 discusses interruptions of service caused by “failure of a component of the network furnished by the Company under these Terms and Conditions.” The Fixed Wireless Terminal is a component of the network furnished pursuant to the Customer Service Agreement.

The fact that the Fixed Wireless Terminal is network equipment rather than CPE further differentiates BUS from mobile services. It also indicates the dominion and control over the Fixed Wireless Terminal exercised by Western Wireless. Thus, BUS customers do not have the freedom to move or to use their radio stations in the same fashion as mobile service customers who own their radio stations.

#### **IV. THE COMMUNICATIONS ACT IS CLEAR THAT MOBILE SERVICES ARE PROVIDED VIA RADIO STATIONS THAT ORDINARILY MOVE**

Despite the Opponents’ protestations and attempts to twist various parts of the Communications Act and Commission precedents in ways that support their desire for BUS to be mobile, the fact remains that the Act unequivocally states that mobile services are those provided via a radio station that is “capable of being moved and which ordinarily does move.”<sup>51</sup> The

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<sup>51</sup> 47 U.S.C. § 153(28). *See also* 47 U.S.C. §§ 332 and 153(27). Dobson’s argument that “the fact that the service is typically operated when the CPE is stationary does not render it ‘fixed’” under the Commission’s rules (Dobson Cellular Opposition at 6) does not demonstrate that the “ordinary” use of the heavy, awkward Fixed Wireless Terminal and associated equipment will be movement from premises to premises. Section 24.5 of the Commission’s rules is, in any event, a PCS rule not applicable to BUS.

considerable efforts of the Opponents to demonstrate that the Communications Act requires CMRS treatment of any wireless service that uses radio stations that are merely capable of being moved, but do not ordinarily move, must fail. Regardless of how one turns the Act to the light, the foundational requirements of both capability of movement and ordinariness of movement of radio stations used to provide mobile services do not disappear. The Act must be read in such a way as to give effect to every provision.<sup>52</sup> The Opponents' interpretations of the Act would read out of the Act the requirement that mobile radio stations must ordinarily move.

**A. Western Wireless' Comments Demonstrate That BUS is Not a Mobile Service**

Western Wireless attempts to argue, however, that BUS is mobile because the Fixed Wireless Terminals are capable of moving and ordinarily do move.<sup>53</sup> Western Wireless states that the Fixed Wireless Terminal "*can* be moved"<sup>54</sup> and that "customers *may* ordinarily move"<sup>55</sup> it. These arguments, however, demonstrate nothing more than that the Fixed Wireless Terminals are capable of being moved, which is only half of the statutory definition. "Can move" and "may move" equate to "capable of being moved," but are not the same as "ordinarily does move."

The trouble shooting chart in the Welcome Package does tell customers to move the Fixed Wireless Terminal to an area with better reception if no reception is available at its current

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<sup>52</sup> *Iowa Utilities Board*, 219 F.3d at 749, 759-760; *Chevron*, 467 U.S. at 842-843. The Act must also be read to find pre-emption of state regulation only when explicitly required by Congress or when necessary to resolve an impossibility conflict. Pre-emption is not authorized because of policy preferences. *Louisiana PSC v. FCC*, 476 U.S. 355, 374-376 (1986).

<sup>53</sup> Western Wireless Opposition at 18-21.

<sup>54</sup> Western Wireless Opposition at 19 (emphasis added).

<sup>55</sup> Western Wireless Opposition at 20-21 (emphasis added).

location. In context, this means moving the Fixed Wireless Terminal within the customer's residence. The same part of the trouble shooting chart also tells customers to check to be sure that the antenna is properly connected "if you have moved the unit from where it was initially installed."<sup>56</sup> These suggestions do not contemplate "ordinary" movement of the degree contemplated by the Act. They only reflect that signal strength may vary at different locations in a customer's residence, or that moving the Fixed Wireless Terminal within the premises may inadvertently disconnect the antenna. Further, the fact that the trouble shooting language uses "*if* you have moved" rather than "*when* you move" the Fixed Wireless Terminal demonstrates that Western Wireless does not expect that the Fixed Wireless Terminal will ordinarily move, despite its statements to the contrary.

Western Wireless shows its hand by stating unequivocally that "[t]he BUS service option has mobile attributes – and therefore must be characterized as a mobile service."<sup>57</sup> Its reliance on the *CMRS Second Report and Order* to support this proposition is misplaced. Western Wireless is correct that the Commission found that dual-use equipment (i.e. capable of both mobile and fixed operation) could form the basis for a service that is considered mobile. The lone example of such equipment was an Inmarsat-M terminal, which is capable of transmission while in motion.<sup>58</sup> Inmarsat-M terminals, unlike the Fixed Wireless Terminals used for BUS, however, are designed to, intended to, and ordinarily do move. In fact, the "M" means mobile.

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<sup>56</sup> Western Wireless Opposition, Exhibit C at 7.

<sup>57</sup> Western Wireless Opposition at 15.

<sup>58</sup> *CMRS Second Report and Order*, 9 FCC Rcd at 1425.

**B. State Rulings on CMRS Status of BUS are Not Dispositive**

Western Wireless attached to its Opposition a ruling from the Nebraska Commission which concludes that “WRS has mobile capabilities and is therefore a mobile service.”<sup>59</sup> As an initial matter, a ruling of the Nebraska Commission, with all due respect to Nebraska, is not binding upon the Commission, especially with respect to issues of federal law. Further, the conclusion is simply wrong as a matter of federal law because it ignores the “ordinarily does move” requirement.<sup>60</sup> Mobile *capabilities* alone are insufficient to warrant a finding that a service is mobile. Moreover, whatever actions were taken by the Nebraska Commission are not at issue here. Petitioners seek a ruling with respect to BUS in Kansas.

The Nebraska decision demonstrates, however, the confusion that exists and the dire need for the Commission to issue a declaratory ruling regarding the CMRS status of BUS and how it may be regulated. It further demonstrates the success that Western Wireless has enjoyed in obfuscating the issues and blurring the distinctions between CMRS providers and the CMRS nature of specific services.

**V. PETITIONERS’ REQUEST THAT BUS BE FOUND FIXED AND SUBJECT TO REGULATIONS GENERALLY APPLICABLE TO UNIVERSAL AND COMPETITIVE SERVICES IS CONSISTENT WITH SOUND PUBLIC POLICY**

The Petitioners’ request that BUS be found to be a fixed service and subject to regulations generally applicable to universal and competitive services is consistent with sound public policy and the public interest. As noted in the Petition, the Commission needs to clarify that the Act

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<sup>59</sup> Western Wireless Opposition, Exhibit A at 11. WRS stands for Wireless Residential Service, which is one of the names Western Wireless has used for BUS.

<sup>60</sup> The North Dakota Commission decision also attached to Western Wireless’ Opposition is also wrong for the same reason.

gives states discretion to regulate fixed wireless services.<sup>61</sup> This will ensure that Kansas does not erroneously believe that it is pre-empted from regulating BUS as it would any other universal or competitive service. Once it is clear that Kansas is not pre-empted by Section 332(c), Kansas can then decide whether and how to apply its regulations pursuant to state law.

A contrary conclusion that states are precluded from applying competitive regulations to competitive services will not serve the public interest or telecommunications consumers in Kansas. Consumers are harmed by regulatory differences that give one service provider a competitive advantage over another.<sup>62</sup> The lack of a level regulatory playing field creates artificial incentives for consumers to prefer one service provider or technology over another rather than allowing consumers to make rational, economic choices among service providers and is contrary to the principle of competitive neutrality. Uneven regulation means that one service provider wins in the marketplace not because of the relative merits of its quality, price, or customer service, but because of artificial market distortions. In the long term, consumers may be stuck with a poorer service simply because the regulatory unevenness did not permit the better service provider to compete.<sup>63</sup>

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<sup>61</sup> Petition at 17-19.

<sup>62</sup> The Commission has recognized that consistent regulation of similar services was among the objectives of Congress when it adopted Section 332. *Regulatory Parity Order*, 9 FCC Rcd at 1418.

<sup>63</sup> Petitioners recognize that Congress chose to subject wireless mobile and wireline services to different regulations and do not suggest that truly mobile wireless services can or should be regulated in a manner contrary to Congress' decision. Fixed wireless services that are close substitutes for wireline service, however, should be regulated similarly to competing services.



Sprint PCS' arguments that Kansas consumers will experience reduced choice of services if BUS is found to be fixed and subject to regulations of general applicability are not credible.<sup>64</sup> Carriers such as Sprint PCS and Western Wireless already offer mobile services in many areas in Kansas. Thus, consumers may already choose to buy mobile services to replace their existing wireline service. If, as Sprint PCS and Western Wireless argue, BUS is just another mobile service, its addition or absence will not make a significant difference in consumer choice. If, however, BUS is a fixed service that is a close substitute for plain old wireline telephone service, no one will be harmed by regulating it equally with other similar services.

Petitioners do not seek special treatment, to have their competitors' efforts thwarted by regulation, or to increase the level of regulation. Indeed, Petitioners, like RTG, would prefer to have the level of regulation reduced generally. At present, however, competitors providing local exchange service via one technology -- wireline-- are potentially subject to a higher level of regulation than competitors providing such service using another technology --wireless. Competitors should be required to compete on the basis of the merits of their service, not on regulatory differences that yield competitive advantages to some competitors over others. The Commission has no authority to reduce the level of state regulation of wireline services. Kansas must decide that issue and whether it will apply its regulations affecting ETCs and competitive service providers equally. Thus, Petitioners only seek here to clarify the extent of federal pre-emption of Kansas law.<sup>65</sup>

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<sup>64</sup> See, e.g., Sprint PCS Opposition at 6.

<sup>65</sup> Petitioners, for example, do not ask this Commission to impose equal access requirements or to restrict the calling scope of BUS. See Sprint PCS Comments at 5-6. In any event, those are issues for the KCC. Petitioners note in this regard, however, that Sprint PCS

Even handed regulation is the key to competitive neutrality and, in this case, to technological neutrality. Western Wireless and the other opponents of the Petition should not fear equal regulatory treatment if their services are competitive in the marketplace. They should fear it, however, if their services are inferior and they must rely on regulatory crutches for marketplace success. The Commission can foster the development of full and fair competition and help to ensure that consumers are given the opportunity to make rational economic decisions and to experience all of the benefits of competition only by granting the petition.

The RUS, which is and has been a “long-time proponent of wireless technology as a rural telecommunications solution” and has actively pursued rule changes that would enable services such as BUS to become reality supports the petition.<sup>66</sup> The RUS recognizes, however, that a level regulatory playing field is imperative to the development of healthy competition, the evolution of new and advanced services, continuation of universal service, and the good of all Americans.<sup>67</sup> The RUS soundly refutes the Opponents claims that grant of the petition will harm the public interest or consumers.

## **VI. CONCLUSION**

For the reasons discussed above, in the Petition, and in the comments, the Commission should grant the Petition, find that BUS is a fixed service, and clarify that it is subject to the same regulations that apply to the services offered by all other ETCs and competitive local exchange

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either misrepresents or misunderstands the record in Kansas. Petitioners have never opposed the expansion of local calling scopes as is clear from the complete text of the Statement in Opposition cited in footnote 11 of Sprint PCS’ Opposition.

<sup>66</sup> RUS Comments at 1.


<sup>67</sup> *Id.* at 2-4.

carriers. Declaratory ruling is needed to eliminate the controversy and to end the confusion that exists in Kansas and elsewhere regarding the CMRS status of BUS and similar offerings and the extent of states' authority under federal law to regulate it.

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January 8, 2001

## **EXHIBIT A**

# You Finally Have A Choice In Residential Telephone Providers



Compare our rates and calling area, then take advantage of our limited time offer.



## LOCAL TELEPHONE SERVICE

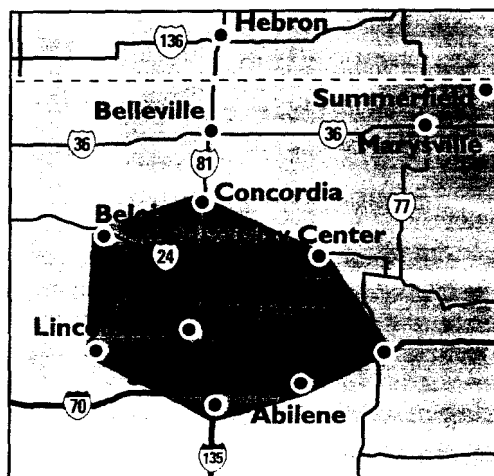
For Minneapolis, KS

Monthly Access Fee	\$14.99 per month
Activation Fee	\$15.00
Install Fee	\$30.00
Included minutes	Unlimited
Long Distance Rates	10¢ a minute to all 50 states 25¢ a minute to Canada
International Rate (Other Than Canada)	29¢ a minute (requires feature)

## OPTIONAL FEATURES:

Voice Mail	\$4.99 a month
Call Waiting	\$2.00 a month
Call Forwarding	\$2.00 a month
Three-Way Conference Calling	\$2.00 a month
3 Feature Package (CW, CF, 3WC)	\$5.00 a month
International Dialing	\$2.99 a month

Local Calling Area



For more information, call  
Customer Care at 1-877-684-8562

*The information contained herein is subject to change. The applicable rates, terms, and conditions of service are contained in a Service Agreement and any Addendums.*

*\*Applies only to monthly access fee. Long distance and features are not included.*

**Wireless Residential Services** by  
**CELLULARONE**

## **EXHIBIT B**

Residents of Minneapolis

# YOU FINALLY HAVE A CHOICE IN RESIDENTIAL TELEPHONE PROVIDERS

**Are you paying  
long-distance  
fees to call just a  
short distance  
from your home?**

**Do you pay  
more than \$15 a  
month for basic  
telephone  
service?**

***Now you don't have to!!***

Cellular One is proud to bring you Wireless Residential Service (WRS). Wireless Residential Service is a residential phone service with the local calling area you expect at the price you deserve.

**Monthly Service Fee \$14.99**

**Long Distance Rates 10¢** per minute to all 50 states

With a larger local calling area, you'll have less long-distance charges and more money in your pocket every month. Plus, our monthly service fees are already saving you money over your current phone services company.

Compare our rates and local calling area, then take advantage of this limited time offer.

***WRS is the right choice if you:***

- have a teenager and need a second line
- have Internet access and could use a second phone line
- want to reduce your long distance bill

To find out more about WRS, contact Joyce Comfort toll free at  
1-877-268-9042

**Wireless Residential Services by**

**CELLULARONE**

**Present this coupon to Joyce Comfort to receive**

**TWO months free\* access.**

\*One coupon per new service activation in the Minneapolis market. INTRODUCTORY OFFER ENDS 6/30/00  
Other limitations and restrictions may apply. See Joyce Comfort for details. No cash value.

## **EXHIBIT C**




CALLING FROM YOUR CAR



**SAFETY**  
*is your first priority!*



CELLULAR**ONE**



A wireless phone in your car is a great convenience, but with this convenience comes responsibility. Protect yourself, your loved ones, and other individuals on the road by following these safety tips:


- 1** Get to know your phone and its features, such as speed dial and redial.
- 2** Whenever possible, use a hands-free device.
- 3** Position your wireless phone within easy reach.
- 4** Let the person you are speaking with know you are driving. Suspend the call in heavy traffic or hazardous weather conditions.
- 5** Do not take notes or look up phone numbers while driving.
- 6** Dial sensibly and assess the traffic; whenever possible, place calls when you are not moving or before pulling into traffic.
- 7** Do not engage in stressful or emotional conversations that may be distracting.
- 8** Use your wireless phone to call for help in the case of fire, traffic or medical emergencies. Remember, 911 is a free call on your wireless phone!
- 9** Use your wireless phone to help others in emergencies, as you would want others to do for you.
- 10** Call roadside assistance in non-emergency situations.

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## **CERTIFICATE OF SERVICE**

I, Nancy Wilbourn, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Reply Comments of the State Independent Alliance and the Independent Telecommunications Group" was served on this 8<sup>th</sup> day of January 2001, via hand delivery, or by first class, U.S. mail, postage prepaid to the following parties:

  
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